Muhammad Faizal Sundrajan bin Abdullah v Public Prosecutor

HIGH COURT (SHAH ALAM) — CRIMINAL APPEAL NO 42-24 OF 1997
ABDUL WAHAB J
4 JUNE 1998

Criminal Law *— Criminal breach of trust — Proof of misappropriation — Extent of payment made to agent not shown — Inconsistencies as to actual amount allegedly not paid to principal — No evidence to prove that accused was agent — Whether trial judge failed to critically assess and analyse prosecution evidence — Penal Code s 409*

The appellant was charged for an offence under s 409 of the Penal Code ('the Code') for criminal breach of trust. It was alleged that the appellant — as an agent of Syarikat Singer (M) Sdn Bhd's branch in Klang ('the company') — had committed breach of trust by handing over a sale receipt without the sale proceeds of RM15,407 to the manager of the company and that the appellant had used the said proceeds for his own benefit. The appellant was convicted of the offence and sentenced to three years jail and two strokes of rotan. The appellant appealed against both the conviction and sentence. Initially, the appellant put forth seven grounds of appeal but abandoned the third ground during submissions. The grounds of appeal includes: (i) the trial judge accepted and believed the testimony of PW1 and PW2 notwithstanding the absence of documentary evidence to support their testimony; (ii) the evidence of PW4 was uncertain as to the extent of how much of the payments made by PW4 was actually received by the appellant and that by third parties which the appellant cannot be held responsible for; (iii) there were inconsistencies in the evidence of PW7, the manager of the company as to the actual amount allegedly not paid to the company; (iv) the maker of exh P3, the statement of outstanding accounts, was not called to testify; and (v) there was no evidence tendered to prove that the appellant was an agent of the company other than the customer's copy of the record of payment which was tendered for identification as ID1 but not formally put in as an exhibit.

Held, dismissing the appeal:

(1) The material part of the evidence of PW1 and PW2 — who were the customers of the appellant — was that payments were made by them but no receipts were issued. Their evidence was consistent and the fact they had outstanding accounts were confirmed by the documentary evidence produced. PW1 and PW2 were called to corroborate the evidence of PW7 that according to the records of the company, payment had in fact been made but that the appellant did not hand over certain sums received. As the testimony of PW1 was not challenged in cross examination, the natural conclusion was that it was accepted by the defence and no documentary evidence in support was

necessary in the circumstances. The challenge to PW2's evidence was clearly an afterthought and the trial judge did not err in arriving at this conclusion (see pp 469C–D, F–G, 470A–B).

(2) The purpose of the evidence of PW4 was to provide corroboration of the evidence of PW7 that the appellant committed an offence under s 409 of the Code in respect of sums he should have handed over to the company. Whilst the uncertainties in the evidence of PW4 diminished its corroborative value, the material fact remained unchallenged that certain payments which were made were not handed over to the company (see p 470H–I).

(3) In a charge under s 409 of the Code, the amount taken is not an ingredient of the offence but merely an ingredient of the element of dishonest taking or converting for own use property one is entrusted with. The value of the amount taken is essentially irrelevant to the offence but merely a factor to consider in sentencing only (see pp 471H–472A).

(4) PW7 was the witness through whom exh P3 was admitted. It was a document produced in the branch of which he was the manager. He was the person who could testify to its accuracy. On this issue, he was not cross-examined (see p 472B–C).

(5) The appellant himself gave evidence that he promoted the agency arrangement with the company and this was also stated in the evidence of PW7. As such, it was unnecessary to actually produce the customer's copy of the transaction card as an exhibit to prove the existence of an agency. The failure to do so after producing it for identification avoided the application of any adverse presumption (see p 472E–F).

[Bahasa Malaysia summary

Perayu dipertuduhkan dengan kesalahan di bawah s 409 Kanun Keseksaan ('Kanun tersebut') iaitu pecah amanah jenayah. Adalah dikatakan bahawa perayu — sebagai seorang ejen cawangan Syarikat Singer (M) Sdn Bhd di Klang ('syarikat tersebut') — telah melakukan pecah amanah dengan menyerahkan suatu resit jualan tanpa hasil jualan sebanyak RM15,407 kepada pengurus syarikat tersebut dan bahawa perayu telah menggunakan hasil tersebut untuk manfaat sendiri. Perayu telah disabitkan atas kesalahan itu dan dijatuhkan hukuman penjara tiga tahun dan dua sebatan. Perayu merayu terhadap kedua-dua sabitan dan hukuman. Pada mulanya, perayu membentangkan tujuh alasan rayuan tetapi meninggalkan alasan ketiga semasa penghujahan. Alasan-alasan rayuan termasuk: (i) hakim perbicaraan menerima dan mempercayai testimoni PW1 dan PW2 tanpa mengira ketiadaan keterangan dokumentar bagi menyokong testimoni mereka; (ii) keterangan PW4 adalah tidak pasti mengenai berapa banyakkah bayaran yang dibuat oleh PW4 yang sebenarnya telah diterima oleh perayu dan oleh pihak ketiga

yang tidak boleh dipertanggungjawabkan oleh perayu; (iii) terdapatnya ketidaktekalan dalam keterangan PW7, pengurus syarikat tersebut mengenai amaun sebenar yang dikatakan tidak dibayar kepada syarikat tersebut; (iv) pembuat ekshibit P3, pernyataan akaun yang masih terhutang, tidak dipanggil untuk memberi keterangan; dan (v) tiada keterangan diberikan untuk membuktikan bahawa perayu adalah seorang ejen syarikat tersebut selain daripada salinan pelanggan tentang rekod bayaran yang dikemukakan untuk pengecaman sebagai ID1 tetapi tidak dimasukkan sebagai satu ekshibit secara rasmi.

Diputuskan, menolak rayuan:

(1) Bahagian material keterangan PW1 dan PW2 — yang merupakan pelanggan-pelanggan perayu — adalah bahawa bayaran dibuat oleh mereka tetapi tiada resit telah dikeluarkan. Keterangan mereka adalah konsisten dan hakikat bahawa mereka mempunyai akaun yang masih terhutang disahkan oleh keterangan dokumentar yang dikemukakan. PW1 dan PW2 telah dipanggil untuk menyokong keterangan PW7 bahawa menurut rekod-rekod syarikat tersebut, bayaran memang telah dibayar tetapi perayu tidak menyerahkan jumlah tertentu yang diterima. Oleh kerana testimoni PW1 tidak dicabar di pemeriksaan balas, kesimpulannya adalah bahawa ia diterima oleh pembelaan dan keterangan dokumentar bagi menyokongnya tidak diperlukan dalam keadaan sedemikian. Cabaran kepada keterangan PW2 jelas merupakan suatu tambahan dan hakim perbicaraan tidak terkhilaf dalam mencapai kesimpulan ini (lihat ms 469C–D, F–G, 470A–B).

(2) Tujuan keterangan PW4 adalah untuk menyokong keterangan PW7 bahawa perayu telah melakukan suatu kesalahan di bawah s 409 Kanun tersebut berkenaan dengan jumlah yang sepatutnya diserahkan kepada syarikat tersebut. Walaupun ketidakpastian dalam keterangan PW4 mengurangkan nilai sokongannya, hakikat yang material tetap kekal bahawa bayaran tertentu yang telah dibuat tidak diserahkan kepada syarikat tersebut (lihat ms 470H–I).

(3) Dalam pertuduhan di bawah s 409 Kanun tersebut, amaun yang diambil bukanlah suatu unsur kesalahan tetapi cuma suatu unsur pengambilan yang tidak jujur atau mengubah harta benda yang diserahkan kepadanya untuk manfaat sendiri. Nilai amaun yang diambil pada dasarnya tidak relevan kepada kesalahan tetapi hanya satu faktor untuk dipertimbangkan dalam menjatuhkan hukuman sahaja (lihat ms 471H–472A).

(4) PW7 adalah saksi menerusi mana ekshibit P3 dimasukkan. Ia adalah dokumen yang dikemukakan di cawangan di mana beliau adalah pengurus. Beliaulah orang yang boleh memberi keterangan mengenai kejituannya. Atas isu ini, beliau tidak diperiksa balas (lihat ms 472B–C).

(5) Perayu sendiri memberi keterangan bahawa beliau telah mempromosikan aturan ejensi dengan syarikat tersebut dan ini juga telah dinyatakan dalam keterangan PW7. Oleh itu, adalah tidak perlu untuk mengemukakan salinan pelanggan atas kad transaksi sebagai ekshibit untuk membuktikan kewujudan ejensi. Kegagalan untuk berbuat demikian setelah mengemukakannya untuk pengecaman mengelakkan pemakaian sebarang anggapan bertentangan (lihat ms 472E–F).]

[*Editorial Note*: The appellant has appealed to the Court of Appeal vide Criminal Appeal No B–09–28 of 1998.]

Notes

For cases on criminal breach of trust, see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1197–1221.

Legislation referred to

Penal Code (FMS Cap 45) s 409

Sandosh Anandan (*Rastam Singa & Co*) for the appellant.
Zabidah (Deputy Public Prosecutor) for the respondent.

Abdul Wahab J: The appellant, Muhammad Faizal Sundrajan bin Abdullah was charged, tried and convicted on a charge:

> Bahawa kamu pada 7 November 1994 lebih kurang jam 12 tengah hari di kedai Syarikat Singer (M) Sdn Bhd di No 38, Lorong Gopeng, off Jalan Goh Hock Huat, Klang di dalam Daerah Klang di dalam Negeri Selangor Darul Ehsan sebagai ejen jualan syarikat tersebut telah menyerahkan resit jualan tanpa wang penjualan bernilai RM15,407 kepada pengurus kedai tersebut bernama Song Kim Keng KP 5727108 (B), yang mana kamu telah menggunakan wang tersebut untuk faedah kamu sendiri, dengan itu kamu telah melakukan kesalahan pecah amanah jenayah sebagai ejen, dengan itu kamu telah melakukan kesalahan di bawah s 409 Kanun Keseksaan yang boleh dihukum di bawah peruntukan yang sama.

Upon conviction on 10 July 1997, he was sentenced to imprisonment of three years and two strokes of the cane. He has appealed against conviction and sentence.

At the hearing of the appeal, the appellant proceeded with the appeal upon the following grounds.

The first and second grounds

The first and second grounds relate to the evidence of PW1 and PW2. They were customers of the appellant. PW1 had given evidence that he had purchased a refrigerator for which he had paid RM600 and upon which he was told he still owed RM720. No documentary evidence was produced to support his testimony. While he stated he had made a police report, the

police report was not produced in evidence. PW2 had given evidence that he had not received any receipts for six months of payments. Receipts issued previous to the six months had been lost in a fire. It was argued, upon the ground that no documentary evidence was produced to support the evidence of PW1 and PW2, that the trial judge had erred in accepting and believing their testimony.

In submitting that no documents had been put into evidence to support the testimony of these two witnesses, the appellant ignored the contradiction in the submission that since these witnesses had not been issued with receipts, they could not submit documentary proof of payment. On the other hand, evidence of previous payments is not relevant to the charge.

The material part of these witnesses' evidence, who were customers of the appellant, is that they had made payments but were not issued with receipts. Their evidence were consistent in that regard. The fact they had accounts outstanding is confirmed by the documentary evidence produced. These witnesses, as were others, have been called to corroborate the evidence of PW7 who gave testimony that according to the records as shown on exh P3, payments had in fact been made but that the appellant did not pay over certain sums received.

The cross-examination of PW1 consisted of whether the witness continued to make payment, whether she knew why the appellant was dismissed and whether she received any receipts. It was not cross-examination in the sense that the appellant's version of events was put to the witness for her response. If the defendant did so, it would establish the appellant's line of defence from an early stage. Doing so would dispel any suggestion that the defence raised was mere afterthought and contrived after having heard the prosecution evidence, which would remove any credibility in the defence version. If the defence is that PW1 never had purchased with payment by instalments, that should have been put to the witness so that the court could hear her answer and decide whether to believe her or not. To the extent her testimony had not been challenged in cross-examination, the natural conclusion is that the defence accepted her testimony. Production of documentary evidence to support her testimony was in the circumstances not necessary.

The cross-examination of PW2 was directed to the line that if the witness did not make payments of instalments, and if a large number of customers did likewise, it would affect the appellant's business. The witness denied the suggestion put to her that she did not make any payments. There was no subsequent evidence adduced that she had not made any transaction, that suggestion was a waste of time. The rest of her evidence was in fact not challenged: that she had entered into agreement to pay by 30 monthly instalments of RM60, that for the last six payments she was not given any receipts by the appellant, that when she received a letter from the company that she still owed RM390 she had gone to meet with the manager of the company explaining she had in fact made the payments, and that she had made a police report upon the advice of the manager.

Given that the challenge was put to PW2 but not to PW1, even though the evidence of these two witnesses in substance are similar, that is that they made payments but were not issued with receipts by the appellant, it would suggest that the line of defence emerged after having heard the evidence and having time to contrive a defence accordingly. The line of defence blossomed further during the cross-examination of PW6. In my view, the trial judge had not erred in arriving at the conclusion that the defence was an afterthought.

The ground now pursued that no documentary evidence was admitted would be relevant to show the existence of a transaction between the company and the witness. But nowhere was this ever part of the defence. The fact no receipt was issued cannot be proved by documentary evidence. There was no suggestion that payment was effected by any form other than cash.

I would therefore dismiss this ground of appeal.

The third ground

The third ground was withdrawn in the course of submission. I need not comment upon it further.

The fourth ground

PW4 was another customer. He had bought a Singer sewing machine for RM1,050 from the appellant. He had paid a deposit of RM80 and had made a number of monthly payments of RM35. He did not remember for how many months. He had made payments to the appellant or the appellant's servant. But he did not receive any receipts. But he did have a customers' card for the transaction which he had given to the police. It was argued that since some payments were not received by the appellant, and that the customers' card was only produced as ID and not as an exhibit, there was no evidence to support the testimony of PW4 and in any case the appellant cannot be held responsible if the money had been received by a third party.

It is an established principle of criminal law that a person can be guilty only for his own acts. There being evidence from the prosecution witness that payments sometimes were paid to an employee of the appellant, that employee must be called to give evidence that he had not pocketed the money that he received but had paid over that sum to the appellant. In other words, if the appellant was made a victim of theft or misappropriation by his employee, he cannot be said to be guilty of breach of trust under s 409 of the Penal Code.

The evidence of PW4 makes it uncertain how much of the payments made by PW4 was actually received by the appellant. How damaging is this?

In my view, the purpose of the evidence of PW4 must be taken in context. He has been called to provide some corroboration to the evidence of PW7 supported by exh P3 that the appellant committed an offence under s 409 in respect of sums he should have handed to the company. In other

words, the victim is the company and not so much the persons who have made the payments. The appellant is charged for the offence as an agent of the company. In other words, the uncertainty as to how many of the payments had been handed to the employee and not the appellant, for the purposes of which PW4 has been called, is immaterial. The material fact remains unchallenged that certain payments were made which were not paid over to the company. Of course, the uncertainty diminishes the corroborative value of the evidence of PW4. On its own, however, it is not a ground of appeal.

The fifth ground

PW7, the manager of the company's branch at the address stated in the charge gave evidence that between 30 October 1994 and 16 November 1994 the appellant had received more than RM16,000. When asked for the money, the appellant delayed. He promised to make payment but between 10 and 12 November 1994 he could not be found. PW7 gave evidence that the amount not handed over was RM15,407 after deduction of the appellant's commission. He referred to the sales report tendered as exh P3. PW7 lodged a police report in Klang and tendered it as exh P5. It was argued that P3 stated the shortage as RM13,552.01 and only when commission was added back did it amount to RM15,407. It was submitted the evidence of PW7 was inconsistent with P3 and therefore his evidence could not be accepted.

In addition, it was argued, certain evidence such as exhs P4(a) and P4(b) were in respect of accounts not involved in the accounts set out in exh P3. The holders of the accounts in these exhibits were not called as witnesses.

The evidence of PW7 says that the appellant was to pay over the sums collected less the commission. The failure of the appellant therefore is in not handing over the balance amount: the shortage. That sum is RM13,552.01 and not the total RM15,407. Even out of the sum of RM13,552.01, we are uncertain on the evidence adduced how much was paid to the appellant and not his employee.

Let me address now whether payment to the employee in this case is a defence. Generally, if PW4 had paid the sum to the employee and not the appellant, and the employee misappropriated it, the appellant cannot be said to have committed an offence under s 409. But is it a defence available to the appellant? That any money was taken by the employee was never part of his defence. Indeed in his evidence, I note he admitted that there were transactions with the customers where he received money and then paid over to the company. He himself admitted he promoted this agent system. In other words, he admitted to being an agent.

In a charge under s 409 of the Penal Code, the amount taken is not an ingredient of the offence. It is merely part of the evidence of an ingredient, that is the dishonest taking or converting to his own use of property he is entrusted with. The description of that property is money. Just as much as

the value of the property is essentially irrelevant to the offence as such, so also the actual sum is irrelevant. Its relevance is only as to seriousness, a factor in sentencing only.

The sixth ground

Exhibit P3 was put into evidence without the maker of it being called. There was no evidence that PW7 was the maker of exh P3. It was submitted therefore that exh P3 should not have been admitted and taken into consideration.

PW7 was the witness through whom exh P3 was admitted. It is a document produced in the branch of which he is the manager. He was the person who could testify to its accuracy. On this issue, he was not cross-examined.

I would also dismiss this ground of appeal.

The seventh ground

The customer's copy of the record of payments of PW4 was only tendered for identification as ID1. The prosecution did not put it in formally as an exhibit. It was argued that the only evidence that the appellant was an agent was in this document marked ID1. Thus if the document is not taken into evidence, the prosecution had failed to prove an essential ingredient of the charge and the court had therefore erred in not dismissing the charge.

That the appellant was an agent was stated in the evidence of PW7. On this issue, he was not challenged, and it must be taken to have been accepted. There was no application to recall PW7 to be cross-examined on this issue. The appellant himself gave evidence that he promoted the agency arrangement. In the light of the other evidence, it was unnecessary to actually produce the customer's copy of the transaction card, and failure to do so after producing it for identification, in the circumstances, avoids the application of an adverse presumption.

In all the circumstances, I cannot hold that the trial judge had erred in accepting that the accused at the relevant time was an agent of Syarikat Singer (M) Sdn Bhd.

The appeal is therefore dismissed and the sentence of the sessions court is hereby confirmed.

Appeal dismissed, sentence confirmed.

Reported by Lew Chee Seong